

No. 77-478

Supreme Court, U. S.

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In the
Supreme Court of the United States

October Term, 1977

**COMMONWEALTH OF PENNSYLVANIA and
PENNSYLVANIA PUBLIC UTILITY COMMISSION,**
Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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DECEMBER 1977

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REPLY BRIEF

The Government argues that intervenors before the U.S. Court of Appeals in a proceeding for direct review of an agency order¹ are governed by the scope of intervention allowed by the particular statutory scheme and the discretion of the Court of Appeals.² From this,

¹ The I.C.C.'s October 29, 1976 decision is now reported. *Cancellation of TOFC Service*, 355 I.C.C. 26.

² The Government refers to the 1944 *per curiam* opinion in *Columbia Gas Co. v. Amer. Fuel Co.*, 322 U.S. 379, which has never been cited by this court in any subsequent opinion.

the Government contends that Elmira's petition for review³ challenged only the cancellation of railroad service at Elmira, N.Y., with "facts" involving cancellation at Reading and Sharon, Pa. being "entirely different", so that the court below properly dismissed the review proceeding over the vigorous objection of the Pennsylvania parties. (Govt. Memo, pp. 3-4).

The short answer is that parties to I.C.C. proceedings may intervene as a matter of right in judicial review of the I.C.C.'s order.⁴ *Brotherhood of Railroad Trainmen v. B. & O. R. Co.*, 331 U.S. 519, 524-25; 28 U.S.C.

³ Elmira's petition for review is set forth in its entirety. (Pet., 5a-8a).

⁴ A single order was issued by the I.C.C. for the termination of all TOFC service at 27 stations. (Pet., 58a).

2323. We suggest that the Supreme Court in 1968, by promulgation of a "notice" form of petition for review, sought to end the practice of the various Court of Appeals to control effective intervention in review of federal agency decisions. *Rules of Appellate Procedure*, 43 F.R.D. 61, 137. See: F.R.A.P. 15(a).

Respectfully submitted,

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